In the United States District Court
for The Northern District of Oklahoma

Lindsey K. Springer)
Plaintiff,)
v.) 06-CV-156
Christopher D. Albin, etal,)
Defendants.

FILED
FEB 7 2011
Phil Lombardi, Clerk
U.S. DISTRICT COURT

Plaintiffs Reply to Collective Defendants Opposition to Plaintiffs Motion to Reconsider.

1. Lindsey K. Springer ("Springer") files his reply to Defendants' Collective Opposition to Springer's Motion to Reconsider this Courts orders finding that two Assistant U.S. Attorneys ("ASUAs") and 11 employees of the United States are immune from suit in Springer's "purported" (Opp at 1) Bivens action.

A. Undisputed Facts

2. At least prior to October 6, 2004, Defendants Horn and Nelson were presenting evidence to a Grand Jury in the Northern District of Oklahoma in the matter of Lindsey Springer and Oscar Stilley. Although the Tax Division denied turning over the evidence of a Grand Jury Investigation until October 21, 2009, the Court, Honorable Stephen P. Friot, ordered the U.S. Attorney office and it's assistants to turn over all information related to Eddy Patterson and Judith Patterson on April 22, 2009. See Doc 43, in 09-CR-043.

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3. The U.S. Attorney did turn over sealed documents from the Patterson criminal case, signed by Horn, Nelson, and Judge Eagan, that showed deals between Horn, Nelson, and Eddy Patterson that were discussed on May 6, 2004, by interview, on August 30, 2004 by formal agreement, and by order on September 1, 2004. See Docs 75-22 in 09-CR-043 dated 6.1.09.

4. On September 1, 2004, Horn and Nelson presented to Judge Eagan a Motion to Downward depart under Rule 35(b) for Judith Patterson stating Ms. Patterson gave "substantial assistance" in the Grand Jury U.S. Attorney Investigation of Springer. Exh. 5, pg 1

5. Ms. Patterson testified in October, 2009, she never spoke to Doug Horn, Melody Nelson, or anyone else about Springer until October 6, 2004, a month after she was released from Prison, and not before. Doc. 388, pg 820, 12-16

6. On September 15, 2005, Brian Shern ("Shern") signed a purported Affidavit that Nelson presented to Honorable Magistrate McCarthy that led to a search warrant being signed by Magistrate McCarthy. Doc 135

7. In the Affidavit, Shern informs Judge McCarthy he is investigating Springer for violations of Title 26, §§ 7201, 7203 and 7212. See Doc 100, def's Exhibit 1, 7/2/09 copy of unsworn search warrant filed in the Clerk's office. See also Shern's Decl. 11/28/07 "Exhibit B" Doc. 135

8. On June 15, 2009, the U.S. Attorney presented in 09-CR-043, the June 10, 2005 "referral letter" presented to deflect claims

9. Horn and Nelson used then Revenue Agent Donna Meadors to issue civil summons while the August 30, 2004 plea agreement between Horn and Nelson showed Horn and Nelson were in an "ongoing" Grand Jury Investigation of Springer.

10. Ms Meadors was the "cooperating" Agent in the Grand Jury investigation of Eddy and Judith Patterson. See Doc 71, pg. 15 in 09-CR-043 ("From January 26, 2004 to December 2, 2004, then Revenue Agent Meadors was conducting a civil investigation into Defendant Springer was promoting... during the investigation and prosecution of Eddy Patterson and his wife, Ms. Meadors worked as the cooperating Revenue Agent...) This was stated on May 29, 2009, just a few days before the Solicitor General directed the interlocutory appeal in June, 2009 in this case.

11. On July 2, 2009, Springer had subpoenaded Horn, Nelson, Meadors, Eddy and Judith Patterson to a Suppression hearing.

12. It was during this hearing Judge Friot asked:

> "Now which of these two documents the June 10th letter or the June 3rd letter, strictly speaking, would you suggest --or something else, for that matter, I don't mean to confine you on that--is the definitive demonstration of the date of referral."

Doc. 383, pg 70, line 20-24 in 09-CR-043 dated 7.2.09.

13. In response, the Tax Division stated:

"The referral would be made by the June 3rd Letter. Because that comes from the IRS. That is their referral letter to the Department of Justice tax division seeking authorization to actually conduct a grand jury investigation of potential Title 26 violations."

14. Even though Springer and Judge Friot were at odds on the "bright line" the Court explained:

"I can't remember offhand whether it was the LaSalle case or another definitive case that held to the effect that we're going to establish the referral to the DOJ as the bright line. Because while a matter is still being investigated by the IRS as part of the Treasury Department, whether it be strictly speaking civil or criminal or perhaps partly both, the matter becomes factually too entwined within that department to sort it out. So the referral to the DOJ is the bright line. That were going to look at here...

Doc. 383, pg 74, line 14-23 in 09-CR-043 dated 7.2.09.

15. On November 28, 2007, Shern files a

declaration with this Court stating that:

"As a Special Agent with the Internal Revenue Service - Criminal Investigation, I have the authority to perform all duties conferred upon such officers under all laws and regulations administered by the Internal Revenue Service, including the authority to investigate, execute and serve search warrants and arrest warrants ... as to all matters relating to such laws and regulations."

Shern Decl, pg 1, 2, See also Doc. 165-7 in this case (06-CV-156); See Doc 135

16. On November 20, 2009 ASUA Kenneth Snoke, in opposing a motion to Dismiss stated:

"As the United States stated in its consolidated response [P]rior to reviewing the document titled Joint Sentencing agreement (Docket 75-22) neither Assistant U.S. Attorney Kenneth Snoke, IRS Special Agent Brian Shern, nor the undersigned, were aware Defendant Stilley was under investigation prior to his March 9, 2006 grand jury appearance. Records of both the United States Department of Justice, Tax Division, and the Internal Revenue Service indicated that the investigation of Defendant Stilley commenced well after Defendant Stilley's grand jury appearance" (Doc. no 80 at 14-15) The grand jury transcript of Mrs. Patterson dated October 6, 2004, is consistent with the representation made by the United States in the pleadings filed in this case." Doc 252, pg 6 in 09-CR-043 dated 11.20.09.

17. The Tax Division went on to say:

"There is no evidence to support Defendant' libelous conjecture that ... Special Agent Shern knew of Mrs Patterson's grand jury testimony."

Doc. 252, pg 6 in 09-CR-043 dated 11.20.09

18. And finally, Mr. O'Reilly and Snoke stated:

"Neither Assistant U.S. Attorney Snoke nor Special Agent Shern were aware that Mrs. Patterson had testified before the grand jury until the pre-trial interview in October of this year." (2009)

Doc. 252, pg 6 in 09-CR-043 dated 11.20.09

19. Mr. Shern testified at Springers trial he learned of the October 6, 2004 testimony when he opened the investigation of Stilley. Doc 392, pg. 1841, 1-3 Trial Trans Shern Testimony in 09-CR-043 dated 11.4.09

20. This time period would no doubt be before

October 21, 2009 (or October 6, 2009) as the Tax Division intentionally misled the District Court.

21. Mr. Shern declared further on November 28, 2007:

> "The authority of Special Agents of the Internal Revenue Service-Criminal Investigation to execute search warrants is set forth in Section 7608(b) of the Internal Revenue Code (26 U.S.C.) On September 16, 2005, I and ten other Special Agents with the Internal Revenue Service-Criminal Investigation executed a search warrant..."

Shern Decl. Page 2, para 6, also attached to Doc. 165-9 See Doc. 135

22. This statement is in fact made in each of the other declarations made by each Bivens Defendant, Doc. 127, 128, 129, 132, 133, 136.

23. Nelson's declaration, as explained by Springer's opposition to the Bivens' Defendants Motion for Summary Judgment stated:

> "Melody Noble Nelson, then assistant United States Attorney ("ASUA") for the Northern District of Oklahoma, was investigating the activities of the Plaintiff, Lindsey K. Springer, for potential violations of Title 26, United States Code. Nelson Decl. ¶ 7."

Doc 165, pg 7.

24. The Memorandum in Support of the Motion For Summary Judgment asserted;

"As part of the investigation, ASUA Nelson prepared a search warrant for the search of Springer's residence in Kellyville, Oklahoma. On September 15, 2005, ASUA Nelson and IRS Special Agent Brian Shern presented the search warrant and Shern's supporting declaration..."

Doc. 165, pg 8.; Doc. 157, 1.16.09, pg 4.

25. Bivens Defendants' in their Memorandum also assert;

"The search warrant for Springer's residence permitted the IRS special Agents who conducted the search to seize 'currency...'"

Memo, pg 1, para 5 dated 1.16.09.

26. At all times during the Bivens case pending prior to June, 2009, all Bivens Defendants, including Horn and Nelson declared the Bivens defendants were in their capacity as "Special Agents of the IRS. Memo dated 1.16.09 unnumbered page (Front) ("It is undisputed that the defendant IRS Special Agents...")
The very first purported undisputed fact alleged by the Bivens defendants

is:

"The Internal Revenue Service (IRS) is investigating the Plaintiff, Lindsey K. Springer, for potential violations of Title 26, United States Code, including tax evasion and the willful failure to file income tax returns. Declaration of IRS Special Agent Brian Shern ("Shern Decl.") ¶ 5; Declaration of Melody Noble Nelson ("Nelson Decl."), ¶ 7")

Doc. 157, 1.16.09 pg 1, ¶ 1.

B. Bivens Defendants' opposition

27. There is no doubt that Springer's Motion addresses both the immunity of Horn and Nelson, Qualified and Prosecutorial, as well as the Qualified Immunity given to the 11 Bivens Defendants on Appeal in 09-5088.

28. Both Horn and Nelson's dismissal were not at issue in that appeal and were not final till December 20, 2010.

C. Horn and Nelson

29. The only opposition Springer can discern is:

"Springer argues that the defendants could not investigate and prosecute him for tax offenses because the

Secretary of the Treasury did not authorize them to do so, Springer's arguments are frivolous and his motion should be denied."

Doc 209 at 1.

30. The only statement in opposition is

"Springer contends that the AUSA and IRS agents are not delegates of the Secretary of the Treasury and they cannot exercise any authority outside the District of Columbia.

31. Springer presumes the Defendants unilateral statement "United States Attorneys for each district are responsible for prosecuting";

"all offense against the United States, which includes Federal Tax Offenses."

32. Springer presumes the reference to 28 U.S.C. § 515 and 516 are self serving for counsel as neither apply to Horn or Nelson.

D. 11 purported "Special Agents"

33. Apparently, Counsel for all defendants intends on keeping the distinction between ASUA Horn and Nelson and the 11 other Bivens defendants a total blur;

"Last, IRS Special Agents are authorized to execute search warrants. 26 U.S.C.

§ 7608(b)." Doc 209 at 4.

34. Springer is guessing to the page # because he has not received Defendants opposition by mail.

E. Argument in Reply

1. All defendants erroneously assert criminal conviction foreclose's their false declarations are subject to challenge.

35. First, it is the evidence only obtained in 09-CR-043 that shows the Declarations in this case relied upon by the 10th Circuit are false. This evidence was not available until after Defendants divested this Court of its jurisdiction when they filed an interlocutory appeal.

36. It is the evidence that Judge Friot concluded the "bright line" referral was on June 3, 2005.

37. This July 2, 2009 conclusion was made before the Tax Division disclosed the October 6, 2004 Grand Jury Transcript of Judith Patterson on October 21, 2009.

38. Although the Defendants cite to Springer's Motion for New Trial (doc #262, 12.8.09) that Motion neither had anything to do with the declarations or immunities this

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On June 28, 2009, U.S. Attorney O'Meilia resigned and no office of U.S. Attorney appointment has yet to be made.

Court gave to each of the 13 Defendants. All defendants argue:

> "In his criminal case, Judge Friot rejected Springer's arguments on the merits in addition to the fact he untimely raised the issue."

39. Without citing to any page in Springer's Motion or the Courts January 28, 2010 order, Bivens Defendants mislead this Court.

40. In its January 28, 2010 order Judge Friot said:

> "Mr. Springer argues that the prosecution team was not authorized to hold office in the State of Oklahoma and that their exercise of any authority outside Washington, D.C. is unlawful. Mr. Springer argues that Brian Shern had no authority to act on behalf of the commissioner of the Internal Revenue Service outside the District of Columbia. Mr. Springer also argues that Thomas Scott Woodward has no authority to prosecute this case because Mr. Woodward is an 'acting' United States Attorney."

Doc. 293, pg. 12

41. Without any finding of facts or conclusions of law on these issues stated therein

the Court said "Mr Springer's authorities do not support his arguments and the court rejects his arguments on the merits." Doc. 293, pg. 12-13.

42. At no time did Judge Friot rule on the truthfulness of the declarations. In fact, at Trial, after Mr. O'Reilly solicited testimony from Mr. Shern the Bivens Defendants only discovered $17,000:

Q. "How much cash was found at Mr. Springer's home?

A. $17,000"

See Doc. 392, pg. 1812, line 15-16.

43. The only issue before the Criminal Trial Court was the impact no Internal Revenue Districts had on Mr. Shern's authority under 26 CFR § 601.107 and that without a U.S. Attorney, Title 28, § 547(1) did not authorize anyone else in a Judicial District to prosecute offenses against the United States.

44. These issues are present in Springer's direct appeal to the 10th Circuit in 10-5055.

45. Springer asks Brian Shern where did he derive his authority to act on behalf of the Secretary of the Treasury to which he responded:

"I would assume I became a delegate, whenever I became a special Agent."

Doc. 399, pg 40, line 12-13

46. Springer had asked Shern "When did you (sic) make you a delegate" to which Shern had answered",

"I dont know." Doc. 399, pg 40, line 1,

47. Mr. Shern testified on July 2, 2009 that there were no declarations "accompanying this search warrant." Doc. 383, pg 28, line 9 Yet, in the memorandum in Support of Summary Judgment the Defendants' State:

"the search warrant and Shern's Supporting declaration."

Doc 157, pg 1.

48. At no time was the issues raised by Springer in his Motion to reconsider addressed in 09-CR-043.

2. The new evidence is the June 3, 2005 and June 10, 2005 referral evidence along with the October 6, 2004 Grand Jury Transcript

49. Defendants' ignore the June 3 and 10th referral letter or its legal significance. If there is no referral from a person authorized to make such referral then neither Horn or Nelson would have prosecutorial immunity.

50. No matter which date this court

ultimately relies upon in determining the referral date, both the October 6, 2004 and June 3 or 10, 2005 dates are before September 15 or 16, 2005.

51. The Defendants do not dispute this construction of the dates.

3. The Mandate Rule exceptions applies due to new evidence.

52. Defendants (all 13) argue the "mandate rule" prevents this Court from reconsidering the Tenth Circuits reversal granting Defendants (only 11) Motion for Summary Judgment. Doc 209, Section II.

53. They admit this Court is free to set aside the mandate in an "extraordinary situation." Id.

54. To decide whether setting aside the mandate would "violate the mandate," it is necessary to "examine the mandate" and then "look" at what the District Court is asked to do. Hicks v. Gates Rubber Co 928 F.2d 966, 969 (10th Cir. 1991)

55. A District Court may deviate from the mandate "under exceptional circumstances including... (2) significant new evidence that was not earlier obtainable through due diligence but has since come to light; (3) if blatant error from the prior... decision would result in serious injustice if uncorrected." U.S. v. Webb, 98 F.3d 585, 587 (10th Cir. 1996)

56. Departing from the law of the case doctrine is "exceptionally narrow" and

includes "(1) when the evidence in a subsequent trial is substantially different,... (3) when the decision was clearly erroneous and would work a manifest injustice." McIlray v. Kerr McGee Coal Corp, 204 F.3d 1031, 1035 (10th Cir. 2000)

57. The mandate rule "is a discretionary guided rule subject to exception in the interest of justice." U.S. v. Moore 83 F.3d 1231, 1234 (10th Cir. 1996) The same test in Moore is the same test in Webb. (See pg 15)

(i) New Evidence

58. First, there has never been any discovery for Springer so cross examination of each Defendant's declaration has not been allowed.

59. Second, the evidence of the referral in October, 2004, or June, 2005, is new, came to light after interlocutory Appeal, and substantially brings into doubt the 11 Defendants were in Springer's home pursuant to their "Internal Revenue Investigation."

60. The Memorandum in Support of the 11 Bivens Defendants stated:

> "The Internal Revenue Service (IRS) is investigating the Plaintiff..."

See Doc. 157, pg 1 dated January 16, 2009.

61. Even as of September 16, 2005, all of the 11 Bivens Defendants declared, they were in Springers home as Special Agents,

62. Shern, for example, declares As a Special Agent he had authority to perform all duties conferred upon such officers under "laws and regulations administered by the Internal Revenue Service." Doc 135, pg 1-2.

63. In fact, every pleading or document filed continually and undeniably refers to the 11 Defendants as "IRS Special Agents."

64. All this court must do is see the words of Judge Frot on July 2, 2009, in citing to U.S. v. LaSalle, 437 U.S. 298 (1978) and his pursuit of the bright line referral rule laid down by the holding in LaSalle.

65. Although there is clear evidence the referral would had to have been made prior to October, 2004, for purpose of this motion, June, 2005 clearly renders everything the 11 Defendants declared related to their official capacity false.

66. The Supreme Court has continually held there is a "bright line" between a civil or criminal investigation by the Secretary of the Treasury and a U.S. Attorney Grand Jury investigatoon after referral by a Special Agent within his Internal Revenue District at 26 CFR § 601.107 (2005). LaSalle 437 U.S. at 314.

67. Internal Revenue Manual at 1.2.48.7 specifically states through Delegation Order 9-6 to all Special Agents of

the Criminal Investigation Function the authority to:

> "refer all criminal matters within the jurisdiction of the Internal Revenue Service to the Department of Justice for Grand Jury investigation, criminal prosecution, or other criminal enforcement action,"

68. The Source of this authority cites Treasury Order 150-35 which is Signed July 10, 2000, citing Section 7803(a).
69. Title 26, § 7803 gives the Commissioner of Internal Revenue authority to administer tax laws.
70. Under LaSalle, the authority of the Secretary of the Treasury ends when the institutional referral is made to the "more particular[14]" U.S. Attorney under 28 U.S.C. § 547(1). 437 U.S. at 312
71. This is a rule "Forbidding such a prophylatic intended to safeguard the following policy interest:

> "A referral to the Justice Department permits criminal litigation to proceed. The IRS cannot try its own prosecutions."

72. For instance, Title 26, § 7602(d) prohibits any issuance of summons once a referral is made until such time a U.S. Attorney transfers the authority back to the IRS. Anaya v

U.S., 815 F.2d 1373, 1377 (10th Cir. 1990)

73. Although Springer points this out to this Court in his Motion, the Defendants refused to explain how the Secretary of the Treasury remained with Title 26, § 7608(b) authority after the criminal institutional referral.

74. This was the bright line Judge Frizzell said he was looking at.

75. The June 3 or 16, 2005 referral date clearly ends the Secretary of the Treasury power conferring same to the U.S. Attorney.

76. Yet, each of the 11 defendants declare, and there counsel insists, the investigation they were conducting on September 16, 2005, and as late as January 19, 2009, was an "IRS Criminal Investigation." Doc 135, 157.

77. Even in their response in opposition the Defendants refer to themselves as "IRS Special Agents." Doc. 135 (for example).

78. Springer will conclude this section with the repeated words declared by all 11 Defendants, and particularly Shern;

> "I was assigned as the case agent to conduct an investigation of Lindsey Springer for allegations of violations of Title 26, United States Code, including tax evasion and failure to file income tax returns. On September 15, 2005, I presented an application and affidavit for search warrant to search Springer's residence in Kellyville, Oklahoma..."

Doc 135

79. Shern was a "case agent" on April 26, 2005 but evidence in 09-CR-043 shows no referral till June, 2005. Although Springer suggests Shern as of November, 2007, was referring to the October, 2004 case, the Tax Division switched the theory to attempt defeat of §7602(d) violations by Ms Meadors.

80. The Tax Division said if Ms Meadors was working for Horn or Nelson in 2004 "We have a very different case", Doc. 383, pg 78, line 18-20.

81. As of September 15, 2005, neither Brian Shern or the other 10 Bivens Defendants were authorized under Title 26, §7608(b) to do anything because "both civil and criminal authority of the Secretary of the Treasury" had ceased due to the October 6, 2004, or June 3 or 10, 2005 institutional referral.

82. There was nothing for the Secretary to investigate or do under Title 26 after referral.

(ii) Other Evidence.

83. Shern, under oath, stating only $17000 was located and seized completely defeats the claim he and the other 10 found $19,000, stole $2000, but did not know steeling money was prohibited conduct.

84. The entire qualified immunity was an attempt to thwart Springer's rights

under Bivens,

85. The Fact no Internal Revenue Districts under Title 26, § 7621 existed since 2000, also was not found by the District Court till July 2, 2009.

86. This finding affects the authority under § 7601, to canvas districts, which also affects § 7608(b) authority. See Hughes v. U.S. 953 F.2d 531, 536 and 542 (9th Cir. 1992); See also LaSalle, 437 U.S. at 308.

87. There is no lawful way in which the 11 Defendants were doing a "IRS Criminal Investigation" as of September 16, 2005 due to the institutional referral. The declarations are simply false and knowingly so.

4. Springer contends the 11 defendants cannot be acting on behalf of the Secretary as of September 16, 2005, or no prosecutorial immunity exists.

88. The collective 13 Defendants argues that claims "ASUA and IRS Agents are not delegates of the Secretary of the Treasury and that they cannot exercise any authority outside the District of Columbia" is Frivolous. Doc 209, pg 3.

89. Although this is not what Springer asserts in his motion dealing with referral evidence, to the degree this claim is construed from Springers Motion, the Defendants cite to no specific authority in support of there

construction of Springers Motion.

90. the Defendants cite to U.S. v. Dawes 161 Fed Appx 742, 746 (10th Cir. 2005) (unpublished) and citing to Lonsdale v. U.S. 919 F.2d 1440, 1448 (10th Cir. 1990) in Support of their frivolous defense.

91. In Dawes, the Panel said;

> "the Dawes argument that the Secretary of the Treasury must establish internal revenue districts in each individual State in order for the district court to have Subject matter jurisdiction is not supported by any authority... (requiring party to support arguments with authority)."

Dawes, 161 Fed Appx at 745

92. A ruling Dawes cited no authority is not a ruling his subject matter jurisdiction claims are "frivolous" as Defendants contend.

93. Even more interesting is that in Lonsdale, at 1448, the Tenth Circuit cited to the IRS being an agency of the United States at §§ 7801-7810 and 26 CFR Part 600.

94. 26 CFR § 601.101 is in "Part 600." 26 CFR § 601.107 is in Part 600. § 601.107 begins each "district" will have a Criminal Division. By district meaning Internal Revenue District. See LaSalle, 437 U.S. at 314.

95. Even if there was Internal Revenue Districts, and there is not since 2000, See Allnutt v. CIR, 523 F.3d 406 (N.1) (4th Cir. 2008); the institutional referral from a Speial Agent ends the authority of the Secretary.

96. There is no Districts. See Doc 71, pg 4 in 09-CR-043, See also Doc 293, pg 5-6 See also Treasury Decision 9156 and 9355.

97. Springer contends the lack of districts or District Directors is as the President said in his State of the Union, that the Tax Code is a bewildering mess, but this issue is minor compared to the fact each of the 11 Defendants falsely stated they were in Springer's home pursuant to Title 26, § 7608(b) doing an "IRS Criminal Investigation" when at all times they each knew that a criminal referral was made on June 3, or 10, 2005 to the U.S. Attorney. (or October 6, 2004).

Conclusion

98. The referral on June 3 or 10, 2005, clearly is a bright line that deprives the Secretary of the Treasury of any authority to administer or enforce Title 26, including § 7608(b), and the 11 defendants were not authorized to act as Special Agents under § 7608(b) due to such referral. Otherwise, if the 11 defendants

remained with Secretary of the Treasury authority then no prosecutorial authority existed due to the Congress placing in the Secretary's power the authority unless referral is made. See *LaSalle*, 437 U.S. at 312.

99. The Defendants never address *LaSalle* or mention the bright line. Since the evidence obtained in 09-CR-043 refutes the declarations submitted to justify Qualified Immunity, this new evidence is extraordinary and this Court should reconsider its immunity, directed by the 10th Circuit on October 15, 2010, and reinstate the Bivens Complaint against all Defendants and order discovery to begin, because otherwise a manifest injustice will have occurred.

Respectfully Submitted

Lindsey K Springer

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Certificate of Service

I hereby Certify that I mailed Plaintiffs Reply to Opposition to Plaintiffs Motion To Reconsider on January 30, 2011 to Court Clerk, U.S. District Court, 333 W. 4th St. Tulsa, Oklahoma 74103.

I Further Certify that all parties will receive Service of this Reply through the Courts ECF System;

Robert D. Metcalfe
James C. Strong.

[signature]
Server

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